IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WILLIE E. LOVE **PLAINTIFF**

V. **CIVIL ACTION NO. 3:09CV268TSL-JSC**

TYSON FOODS, INC. **DEFENDANT**

MEMORANDUM BRIEF OF TYSON FOODS, INC. IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant, Tyson Foods, Inc. ("Tyson"), through counsel, submits its Memorandum Brief in Support of Its Motion for Summary Judgment, as follows:

I. INTRODUCTION

Plaintiff, Willie E. Love, originally filed his Complaint in this action in the Circuit Court of Hinds County, Mississippi, First Judicial District, on March 12, 2009. Tyson was served with process on April 3, 2009 and timely removed this action to this Court on April 29, 2009. *See* Exhibit A. Love alleges in his Complaint that he was subjected to race discrimination and retaliation in the terms and condition of his employment with Tyson in violation of Title VII of the Civil Rights Act of 1974, 42 U.S.C. §§ 2000e, *et seq.*; and 42 U.S.C. § 1981. He also claims intentional infliction of emotional distress in violation of Mississippi law. In addition, Love alleges that he is entitled to punitive damages. [1] Tyson filed its Answer denying the allegations of Love's Complaint and asserting other defenses on June 11, 2009.

On May 1, 2008, Love filed for bankruptcy, pursuant to Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Mississippi, bearing Case No. 08-11707-DWH. A copy of Love's bankruptcy petition is attached to Tyson's Motion as Exhibit "D". On May 14, 2008, Love filed a plan in which he stated that he had no assets to pay his unsecured creditors. *See* Exhibit E to

[1] Love previously filed a Charge of Discrimination with the Equal Opportunity Commission ("EEOC") on May 30, 2008. *See* Exhibit B. EEOC issued a Notice of Right-to-Sue letter on December 16, 2008. See Exhibit C. A copy of the Charge and Right to Sue Notice are also attached to Love's Complaint. *See* Exhibit A.

Motion. On May 14, 2008, Love filed a set of Schedules in his bankruptcy case in which he declared under penalty of perjury that he had no contingent or unliquidated claims. *See* Exhibit F to Motion. On September, 22, 2008, the bankruptcy court entered an Order confirming Love's bankruptcy plan. A copy of the bankruptcy court's Order is attached to Tyson's Motion as Exhibit "G". Tyson became aware of Love's pending bankruptcy on July 1, 2009. Love's bankruptcy case is presently pending.

Love did not disclose his claims in this case to the bankruptcy court, and he has not amended his bankruptcy filing to reflect that he filed a charge with the EEOC (just thirty days after he filed for bankruptcy) or that he filed the instant lawsuit. The claims asserted in this case are based on alleged conduct which predates Love's bankruptcy petition. *See* Complaint and Charge, Exhibits A and B to Motion. Because Love failed to disclose these claims in his bankruptcy case, he should be judicially estopped from pursuit of this lawsuit.

II. ARGUMENT

A. Judicial Estoppel – The Law

A debtor is required to disclose all existing or potential claims in a bankruptcy petition.[2] 11 U.S.C. § 521 (1). A debtor must amend his bankruptcy schedules if circumstances change. *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999). "The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action." *Id.*; *In re Superior Crewboats, Inc. v. Primary P & I Underwriters,* 374 F.3d 330, 335 (5th Cir. 2004)(quoting *In re Coastal Plains*, 179 F.3d at 207-08). The Fifth Circuit has stated that "the importance of this disclosure duty cannot be overemphasized." *Id.* (citing *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3rd Cir. 1988)(discussing importance of disclosure to creditors and to the bankruptcy court). When a debtor fails

[2]As part of a bankruptcy filing, the debtor is required to state and certify to the accuracy of several matters. This information is included in a body of "Schedules". Schedule B is titled "Personal Property". Item twenty-one (21) on Schedule B requires a statement of all contingent and unliquidated claims of a debtor. Contingent and unliquidated claims are required to be stated under Item 21. *See* Exhibit F to Motion.

to disclose a pending or potential claim in his bankruptcy petition, he is judicially estopped from bringing that claim later. *Id.* at 210. The federal common law doctrine of judicial estoppel prevents a party from taking inconsistent positions in litigation. *Bridgewater v. Northrop Grumman Ship System,* Inc., 2007 U.S. Dist. LEXIS 87926 *11 (Nov. 29, 2007)(quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988); *Scott v. Vorha*, 414 F.Supp.2d 631, 634 (S.D. Miss. 2005)(quoting same). "The purpose of the doctrine is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self interest." *In re Coastal Plains, Inc.*, 179 F.3d at 205.

The Fifth Circuit has adopted a three-prong test to determine whether a plaintiff is judicially estopped from asserting a claim against a defendant in the context of disclosure of bankruptcy assets. Courts have strictly and consistently applied this test to foreclose a party from pursuing existing claims and/or a lawsuit where such matters were not disclosed during the debtor's/plaintiff's pending bankruptcy. *See generally In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999), *In re Superior Crewboats, Inc.*, 374 F.3d 330 (5th Cir. 2004), and *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Cir. 2005). A debtor is precluded by judicial estoppel from bringing a suit against a defendant if: (1) the party asserting the claim is taking a position that is plainly inconsistent with his prior legal position; (2) the court accepted the previous position; and (3) the non-disclosure was not inadvertent. *Scott*, 414 F.Supp.2d at 634 (quoting *In re Coastal Plains*, 179 F.3d at 207-208); *Bridgewater,* 2007 U.S. Dist. LEXIS 87926 at *16.

If a debtor/plaintiff fails to disclose an existing, pending or potential claim during a bankruptcy proceeding and later attempts to pursue that claim in a court of law, then element one of the test for judicial estoppel is met. *Amos v. Sanderson Farms, Inc.*, 2006 U.S. Dist. LEXIS 48410 (May 31, 2006). The second element of the judicial estoppel test is met if a bankruptcy court merely adopts an assertion or omission by a debtor in a bankruptcy proceeding which is inconsistent with a later legal claim. *Id.* at *10. The third element for application of judicial estoppel—that failure to disclose a cause of action on the

bankruptcy schedules was not inadvertent—may be avoided by the debtor/plaintiff only by proof that the debtor/plaintiff lacked (1) knowledge of the inconsistent position; or (2) that no motive for concealment existed. *Id.*

The judicial estoppel doctrine has been applied in this Circuit in the bankruptcy context to bar tort claims not disclosed by the debtor in his bankruptcy schedules. In *In re Superior Crewboats, Inc. v. Primary P & I Underwriters,* 374 F.3d 330 (5th Cir. 2004), the court barred the claims of plaintiffs who initially failed to disclose a personal injury claim in their bankruptcy schedules, even though they later amended their schedules to include the claim. Finding the plaintiffs' amendment untimely, the court said the plaintiffs' failure to list the claim was "tantamount" to a representation that no such claim existed. *Id.* at 335. The court said the bankruptcy court's discharge and closing of plaintiff's bankruptcy satisfied the second prong of the judicial estoppel test. *Id.* When the plaintiffs' tried to argue that they lacked the motive to conceal the personal injury claim, the court ruled that the non-disclosure was not inadvertent because "having filed the suit against the defendant, the plaintiffs clearly had knowledge of the claim and they had the requisite motivation to conceal the claim as they would certainly reap a windfall had they been able to recover on the undisclosed claim without having disclosed it to the creditors." *Id.* at 336.

The Fifth Circuit has similarly applied the doctrine of judicial estoppel in cases, like the case at bar, where a plaintiff has filed an EEOC charge (and subsequent lawsuit) while a bankruptcy petition was pending and where the plaintiff did not fulfill the duty to amend the petition to include that claim. In *Kamont v. West*, 83 Fed. Appx. 1 (5th Cir. 2003) (unpublished), the court applied the doctrine to bar the claims of a former federal employee who brought an employment action against her employee for discrimination. The plaintiff filed three EEOC complaints before she filed for bankruptcy and one after her bankruptcy filing. The court held that all four complaints were judicially estopped because the plaintiff failed to disclose them when she filed her petition and as her petition was pending.

The court reached a similar result in *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Cir. 2005). There, the plaintiff filed a charge with the EEOC and subsequently filed a Title VII action against her former employer. The plaintiff filed a Chapter 13 bankruptcy petition a month after she filed the lawsuit and never disclosed to the bankruptcy court the EEOC charge or the Title VII action. The court held that plaintiff "was under a duty both to disclose the existence of her pending EEOC complaint when she filed her petition and to disclose her potential legal claims *throughout the pendency* of that petition . . . The obligation to disclose pending and unliquidated claims in bankruptcy proceedings is an ongoing one." *Id.* at 600 (emphasis added).

B. <u>This Action is Barred by Judicial Estoppel</u>

All three prongs of the Fifth Circuit's test for judicial estoppel are met in this action. First, Love did not disclose the claims asserted in this action as an asset to the bankruptcy court, nor has he amended his bankruptcy schedules to disclose the existence of the EEOC charge or the instant action, in spite of his ongoing obligation to do so throughout the pendency of his bankruptcy. Indeed, Love has consistently maintained in his bankruptcy case that he has no such claims. *See* Exhibits F and G to Motion. Love's position in the bankruptcy court and the claims he asserts in this action are clearly inconsistent. Love filed his EEOC charge just thirty days after filing for bankruptcy. *See* Exhibit B to Motion. He was plainly aware of the allegations he makes in this case at the time he filed his bankruptcy petition on May 1, 2008. At a minimum, he had an obligation to disclose such matters at a very early stage in his bankruptcy proceeding. His omission of the claims asserted in this action from his mandatory bankruptcy filings constitutes a representation that no such claims exist. His contention before this Court that his claims are viable is entirely inconsistent with what he stated under penalty of perjury in his bankruptcy filings and thus readily satisfies the first prong of the judicial estoppel inquiry.

Second, the bankruptcy court adopted Love's contention that he had no existing or potential claims

as assets. *See* Exhibit G to Motion. Adoption does not require a formal judgment; rather, it only requires "that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Amos v. Sanderson Farms, Inc.*, 2006 U.S. Dist. LEXIS 48410 at *10 (quoting *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988). Here, the bankruptcy court relied on Love's non-disclosure and entered an order confirming Love's Chapter 13 bankruptcy plan, under which, among other things, Love's unsecured creditors are to receive no payment. *See* Exhibit G. By entering this order, the bankruptcy court adopted Love's declaration that his assets and liabilities did not include the claims he has asserted in this action. This plainly satisfies element two of the test for judicial estoppel.

Finally, Love's non-disclosure of a the claims asserted in this action as an asset was not inadvertent. "The debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *In re Coastal Plains*, 179 F.3d at 210. Neither consideration exculpates Love in this instance. All allegations at issue in this case arise from a time period predating the filing of Love's bankruptcy. *See* Exhibits A and B. Thus, Love was aware of the alleged facts underlying the instant action (his alleged wrongful termination) at the time he filed bankruptcy, and of his continuing obligation to disclose the instant allegations and claims to the bankruptcy court. Since the claims asserted in this case are based on alleged conduct which predates Love's bankruptcy petition, Love had the requisite knowledge to disclose his claims to the bankruptcy court when he filed bankruptcy. Further, Love has had an ongoing duty to disclose the claims asserted in this case in his bankruptcy proceeding, but has not done so. Indeed, his EEOC claim was filed on May 30, 2008, approximately one month after he filed his bankruptcy case, and about two weeks after he filed his Schedules containing a declaration that he had no such claims. *See* Exhibit F. Love had a motive to conceal both the EEOC charge and the instant action because any recovery he might receive from this litigation

would go to him free and clear of any claims of his creditors, particularly his unsecured creditors who receive nothing under his confirmed plan. *See* Exhibit G.

Love's failure to disclose his EEOC proceeding— a proceeding which he began just thirty day after filing for bankruptcy— the present lawsuit, or any potential claim arising out of the facts of this lawsuit in his bankruptcy case bars this action. He should be judicially estopped from further pursuit of this lawsuit. His claims against Tyson should be dismissed, with prejudice.

IV. CONCLUSION

For the reasons stated above, Tyson is entitled to summary judgment in this action. Love's Complaint should be dismissed, with prejudice, at the cost of Love.

RESPECTFULLY SUBMITTED, this the 16th day of July, 2009.

TYSON FOODS, INC.

By: **/s/ Tiffany M. Graves**

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CERTIFICATE OF SERVICE

I, TIFFANY M. GRAVES, do hereby certify on July 16, 2009, I electronically filed the foregoing ***Memorandum Brief of Tyson Foods, Inc. In Support of Its Motion for Summary Judgment*** with the Clerk of the Court using the ECF System which sent notification of such filing to the following on the following:

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This the 16th day of July, 2009.

/s/ Tiffany M. Graves

Tiffany M. Graves